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No. 88-1180

In the
Supreme Court of the United States
October Term, 1988

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL NO. 246, and ALAN ROOK,

Petitioners,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether state law claims for invasion of privacy of union employees working at a nuclear generating station are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, when:

   (a) the collective bargaining agreement recognizes the employer's right to manage the nuclear power plant, to direct the working force and to implement reasonable safety rules and require their observance; and

   (b) the claims challenge the propriety of a drug screen urinalysis implemented as a term and condition of employment by the employer under its contractual authority to manage the facility and implement safety and work rules; and

   (c) the union has filed a grievance over the implementation of the drug screen.

2. Whether the Ninth Circuit's decision is in conflict with the Sixth Circuit's decision in *Smolarek v. Chrysler Corp.*, 858 F.2d 1165 (6th Cir. 1988).

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Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Defendant-Respondent Southern California Edison Compan ("SCE") opposes the petition for writ of *certiorari* filed by Plaintiff Petitioners Utility Workers Union of America, AFL-CIO, Loca No. 246, and Alan Rook (collectively referred to herein as "Loca 246"). No significant legal issue is presented by the petition an Local 246 misapprehends governing case authority of this Cou and the circuit courts.

JURISDICTION

Jurisdiction is based on 28 U.S.C. § 1254(1) for review b writ of *certiorari*. Jurisdiction below was invoked pursuant Section 301 of the Labor Management Relations Act, 29 U.S.C. 185 ("Section 301") and 28 U.S.C. § 1441.

STATEMENT OF THE CASE

In its petition, Local 246 sets forth a "Statement of the Cas which purports to relate the facts and procedural history of th

instant matter. SCE respectfully submits the following statement of the case, which describes the seminal history of this dispute and corrects several significant inaccuracies in the petition.

As the operator of the San Onofre Nuclear Generating Station ("SONGS"), SCE has implemented several personnel screening devices for controlling access to the "Protected Area" at the station, a security area encompassing the nuclear reactors and to which access is strictly governed. No worker is permitted unescorted access to the Protected Area until a comprehensive background investigation and psychological evaluation have been completed. Additionally, all individuals — including those represented by Local 246 — are searched upon entry into the Protected Area.

In September 1984 a drug screen urinalysis was put into effect without prior negotiations with Local 246, which thereafter filed a grievance asserting that the implementation of the drug screen was not authorized by the applicable Collective Bargaining Agreement between Local 246 and SCE. In addition, Local 246 filed a charge with the National Labor Relations Board ("NLRB") alleging that SCE's unilateral implementation of the drug screen program was an unfair labor practice in violation of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1) and 158(a)(5). The NLRB deferred the charge to arbitration and Local 246 did not pursue the matter or otherwise challenge SCE's actions in court. (App.3a-4a.)[1]

Approximately two years after this drug screen was first implemented, SCE made certain changes in its administration, including modification of the test schedule so that the nuclear workers would not know the annual test date well in advance. On December 8, 1986, Local 246 filed a grievance asserting that this modification violated the Collective Bargaining Agreement. (App.4a.)

Despite the fact that it had grieved the implementation of the modified drug screen, Local 246 filed this action in state court on December 10, 1986, alleging a breach of contract under Section 301 as well as violations of the California Constitution, Article 1, Sections 1 and 13, which confer a right of privacy and freedom from unreasonable search and seizure. The state court

[1] "App.3a-4a" refers to pages 3a-4a of the appendix to the petition. Similar references are used throughout this brief.

issued a temporary restraining order on that date. SCE remove the case to federal court. (App.4a.) After the parties submitte several briefs on the issues of pendent and subject matt jurisdiction, the district court issued an order dismissing the fir three causes of action of the underlying complaint on the groun that the state law claims asserted therein were preempted b federal law. Because Local 246 had not exhausted the grievan and arbitration procedures, the state law causes of action we not cognizable under Section 301. (App.14a-15a.)

The district court found that it had concurrent jurisdictio with the NLRB over the remaining Section 301 cause of actio and issued a preliminary injunction in aid of arbitration despite the concomitant findings that Local 246 would not suff irreparable harm if the drug screen were implemented and th the parties' Collective Bargaining Agreement provided th grievances be arbitrated in chronological order. (App.17a-20a.

After the district court certified the order dismissing t state law claims pursuant to Rule 54 of the Federal Rules of Civ Procedure, both parties filed appeals to the rulings adverse them. The Ninth Circuit determined that Local 246's state la privacy claims were substantially dependent upon analysis the Collective Bargaining Agreement and constituted a prop negotiable subject for collective bargaining. (App.6a.) The cou specifically noted that resolution of the claimed state la violations rests upon Articles VI and X.N of the Collecti Bargaining Agreement, which recognizes SCE's right to mana the plant, to direct the working force and to implement a enforce reasonable safety rules. In light of the fact that resoluti of Local 246's claims required reference to and reliance on t Collective Bargaining Agreement, the Ninth Circuit upheld t dismissal of the state constitutional law claims.[2] (App.6a-8a.) T Ninth Circuit denied Local 246's request for rehearing *en ba* (App.12a.)

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[2] The Ninth Circuit also held that the district court should have dismissed Section 301 claim itself in light of Local 246's failure to comply with availa grievance procedures. It also concluded that the district court erred in issu a preliminary injunction against implementation of the drug testing progr pending arbitration. Local 246 contests neither of these holdings by Ninth Circuit. (Petition at 3-4 n.2.)

SUMMARY OF ARGUMENT

This case presents no issue which would warrant granting the petition for writ of *certiorari*. Local 246's assertion that the Ninth Circuit departs from this Court's rulings in *Caterpillar Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987), and *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. ____, 108 S.Ct. 1877 (1988), is based on a fundamental misreading of those cases. In addition, Local 246's argument that the Ninth and Sixth Circuits are in conflict is wrong: the Sixth Circuit case cited by Local 246 is in total harmony with relevant Ninth Circuit authority. The Ninth Circuit's ruling in this case was based on long-standing and unequivocal case authority, including this Court's rulings. It was soundly reasoned, is in accord with analogous cases from other circuits and provides no basis for scrutiny by this Court.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 17 sets forth a detailed list of reasons for granting review on writ of *certiorari* and also states that review is granted "only when there are special and important reasons therefor." None of the reasons for granting review enumerated by Local 246 obtains in this case, nor are there any other "special and important reasons" for granting review on writ of *certiorari*.

First, Local 246 has persisted in both misplaced reliance on *Caterpillar Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987), and a fundamental misreading of the case. *Caterpillar* sets forth the standard for *removal* under Section 301, and the propriety of removal is not and has never been at issue in this case.[3] Local 246's discussion of the "complete preemption" doctrine and "defensive" preemption is immaterial to the instant dispute.

Contrary to Local 246's assertion, neither the Ninth Circuit nor the Supreme Court in *Caterpillar* reached the issue of whether the state law claims asserted in that case were preempted by

[3] As Local 246 concedes in its petition, the underlying complaint contained a cause of action for breach of the Collective Bargaining Agreement under Section 301; thus, removal was appropriate on the face of the complaint irrespective of the nature of the state law claims. (Petition at 3-4.)

federal labor law. Both courts held simply that removal w improper because on the face of the complaint the claims we grounded in state, not federal law, and did not constitute "artful pleaded" Section 301 claims. The substantive preemption questi was expressly reserved by both the Ninth Circuit (786 F.2d 92 937 (9th Cir. 1986)) and the Supreme Court on review (482 U. at ____ n.13, 107 S.Ct. at 2433 n. 13). *Caterpillar* itself, then, mak clear that the merits of the preemption issue, *i.e.*, whether sta claims are extinguished by federal law, is an issue distinct fro the issue of the jurisdictional basis of their removal to feder court. *See also Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *ce denied*, 108 S.Ct. 1732 (1988).

Local 246 asserts that like the plaintiffs in *Caterpillar*, "chose" not to rely on the applicable Collective Bargainir Agreement but on state law. (Petition at 4-5.)[4] *Caterpillar* is whol distinguishable. In that case, the plaintiffs alleged breach individual employment agreements made when plaintiffs we non-union employees, outside the aegis of the bargainir agreement. For purposes of removal, this Court determined th the state law claims were neither grounded in the agreeme nor substantially dependent on analysis of the agreement f their resolution. Critical to this Court's decision was the fact th the claims raised did not address or require any interpretati of the relationship between the alleged individual contracts ar the collective bargaining agreement. 482 U.S. at ____, 107 S.C at 2431. The labor agreement in that case would come into pl only in defense of the state law wrongful discharge claims. at ____, 107 S.Ct. at 2432.[5] Here, of course, as the district cou and the Ninth Circuit correctly found, SCE's right to impleme and later modify a drug testing program is mandated by t Collective Bargaining Agreement itself and resolution of t state law claims necessarily requires consideration of the Colle tive Bargaining Agreement.

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[4] Local 246's assertion is not accurate. Local 246 did choose to rely on Collective Bargaining Agreement when it fashioned its state court complai It sued SCE for breach of contract (the Collective Bargaining Agreeme and sought an injunction pending arbitration under the Collective Bargaini Agreement.

[5] Again, this Court in *Caterpillar* neither decided the substantive preempti issue nor did it suggest that all allegations of preemption under Section are "defensive" as Local 246 seems to suggest. *See Allis-Chalmers Corp. v Lue* 471 U.S. 202 (1985).

Although Local 246 has labeled the claims "constitutional" violations, the challenge is to the conduct of SCE undertaken under the authority of the parties' Collective Bargaining Agreement. Article X.N. of that Agreement requires SCE to provide for the safety of its employees and grants to SCE the right to promulgate and enforce "reasonable" safety rules. Additionally, Article VI, the management rights clause, reserves to SCE the broad right to manage and direct the plant and its employees. (App.6a.) If Local 246 objects to SCE's exercise of its rights under these or any other provisions of the Collective Bargaining Agreement, this claim may be pursued through the grievance procedure to binding arbitration by virtue of Articles IV and V.

Such a challenge may ultimately resolve whether an action undertaken by SCE — such as the modification of its drug testing program at SONGS — is an unreasonable exercise of management discretion, an unreasonable safety or work rule or an unreasonable intrusion upon its employees. In recognition that the grievance/arbitration procedure provides the appropriate forum for resolving such employer/employee issues, Local 246 filed a grievance protesting the initial drug test requirement and is pursuing it through arbitration. A grievance was also filed under the grievance/arbitration provisions of the Collective Bargaining Agreement in connection with the December 1986 modification at issue here.

Thus, even Local 246 recognizes that SCE's claim of right derives from the Collective Bargaining Agreement and any challenge to that right is governed by that Agreement. Accordingly, as the district court and Ninth Circuit determined, Local 246's state law "constitutional" claims are preempted by Section 301, a ruling totally compatible with this Court's opinion in *Caterpillar*.

Similarly, The Ninth Circuit opinion does not conflict with this Court's ruling in *Lingle*. In *Lingle*, in fact, this Court reaffirmed that Section 301 jurisdiction obtains where plaintiffs' claims can be resolved only by reference to the terms of a collective bargaining agreement. In that case, which involved a claim of retaliatory discharge based on the state workers' compensation statute, no reference to the parties' bargaining agreement was necessary. Illinois law provided that protection from retaliatory discharge is non-negotiable and applies to both union and non-union employees. Well established pertinent principles of Illinois

law would not require a court to construe the collective bargaining agreement. 486 U.S. at ____, 108 S.Ct. at 1882-83.

In this case, however, both the claim that drug testing violates union employees' right to privacy and the claim that such testing is an unconstitutional search and seizure necessarily depend for their resolution on an analysis of the Collective Bargaining Agreement. As Local 246 itself concedes, state law privacy rights are not absolute. (Petition at 4.) Such claims have at their core the individual's right to be free of objectively unreasonable searches or intrusions. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977); *People ex rel. Franchise Tax Board v. Superior Court*, 164 Cal. App.3d 526, 540-41, 210 Cal. Rptr. 695, 703-04 (1985) (basic test of whether California's constitutional right of privacy has been violated "is whether a person's personal and objectively reasonable expectation of privacy has been infringed by unreasonable governmental intrusion"). Regardless of the state law label attached to the claims, the reasonableness of SCE's drug test program at SONGS and the privacy expectations of its employees are a function of Articles VI and X of the Agreement which recognize SCE's right to manage the plant, direct the working forces, and implement reasonable safety requirements. Employee privacy at SCE is not independent of the Collective Bargaining Agreement but, instead, is defined by it.

Privacy rights do not exist in a vacuum nor are they devoid of variance. It is clear that the "reasonableness" of both the expectation of privacy and the intrusion depends on the circumstances. There is no "fixed" standard. Even if a state privacy right itself could not be "waived," the expectation of privacy may certainly be altered. Under federal constitutional provisions similar to the ones relied on by Local 246, the highly regulated character of an industry and the nature of the work place may affect the expectation of privacy by an employee and the justification for the intrusion. *See, e.g., Rushton v. Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988) (random drug testing of employees at publicly-owned nuclear power plant upheld); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (random drug testing of horse racing jockeys upheld) and *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (random urine screens of prison correctional officers upheld). Thus, the extent of a "right to privacy" in the workplace is dependent on the circumstances of employment.

One of the obvious "circumstances" of employment here extant is that there is a Collective Bargaining Agreement,

negotiated with an employer engaged in a highly regulated and safety-conscious industry which, by virtue of the safety and management rights clauses, may delimit an employee's *expectation* of privacy. It is clear that objective "reasonableness" is at the core of incursions on an employee's privacy, and that the determination of "reasonableness" is properly a function embraced in the Collective Bargaining Agreement. Particularly where, as here, an employer has the right to impose reasonable safety or work rules, the reasonableness of such requirements must be tested by the grievance and arbitration provisions contained in the Collective Bargaining Agreement. *See Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988), discussed *infra*. As noted, Local 246 clearly recognizes this maxim of labor law; it has filed a grievance alleging that the drug screen violates the Collective Bargaining Agreement. Thus, it was entirely proper for the district court and Ninth Circuit to find that the state law privacy claims were preempted by and governed by Section 301.

Local 246's preoccupation with the issue of "waiver" is prompted by misplaced reliance on dicta in *Lingle*. In footnote 9, the Court refused to decide whether a union could waive non-preempted state law rights (such as protection from retaliation for filing a workers compensation claim in that case) but noted that such waiver would require clear evidence of an intent to waive those rights. 486 U.S. at ____ n.9, 108 S.Ct. at 1882 n.9. As noted, however, the *Lingle* case involved non-negotiable, state law rights which did not depend on a collective bargaining agreement for their enforcement, *i.e.*, as it clearly stated in footnote 9, the Court was addressing waiver of *non-preempted* state law rights. As to claims such as the state law privacy claims in this case, which, because of the very nature of the claims, depend for their resolution on the contents and interpretation of a collective bargaining agreement, the claims are preempted and the footnote is irrelevant. It is one thing to possess an absolute right to bring a lawsuit in retaliation for filing a workers compensation claim, which the state courts have determined to be non-negotiable (the case in *Lingle*) and quite another to possess a right such as the privacy protection claimed herein, which, as Local 246 concedes, is *not* absolute and the nature and scope of which depend substantially on the parties' Collective Bargaining Agreement.

Local 246 has simply missed the thrust of the *Lingle* case. This Court reaffirmed that its decision "should make clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective bargaining agreements." *Id.* at at ____, 108 S. Ct. at 1884. *See also Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985); *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987).

Finally, there is no conflict among the Circuit courts. Local 246's attempt to create such a conflict based on *Smolarek v. Chrysler Corp.*, 858 F.2d 1165 (6th Cir. 1988) is unavailing. In its own brief, in fact, Local 246 notes that the Ninth Circuit has concurred with the *Smolarek* holding that a union employee's claims based on state anti-discrimination statutes are not pre-empted by Section 301. (Petition at 20-21 n.13). The instant case has nothing whatsoever to do with state anti-discrimination laws.

Local 246 also fails to point out to this Court that the Ninth Circuit's ruling is in total *harmony* with analogous cases from the Fourth and Fifth Circuits and, most recently, the First Circuit. In *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985), two union employees suspected of on-duty drug use were suspended and later reinstated after drug tests proved negative. Both filed grievances over the company's action and, in addition, filed a court action alleging state tort claims which, like Local 246's claim herein, included invasion of privacy. One of the employees claimed that he was forced to submit to searches of his person (blood and urine testing), his automobile and his locker. *Id.* at 705. The Fifth Circuit rejected the notion that the invasion of privacy claim was a claim independent of the collective bargaining agreement:

> These various claims by the appellants demonstrate clearly an attempt to create major state court claims out of matters which are all part of a company claim of right under a collective bargaining agreement, and the employee's right to challenge such claims through grievance procedure ending in binding arbitration. *Id.*

The Fifth Circuit determined that Section 301 preempted the invasion of privacy claims and stated that if the plaintiffs wanted to challenge the drug testing program, the "obvious remedy" was to refuse the searches and file a grievance if disciplinary action was taken, and thereby test the reasonableness of the

searches. To hold otherwise would destroy "the critically important aspect of collective bargaining which is involved in the establishment of the grievance procedure to protest breaches of labor contracts. . . ." *Id. Accord, Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987) (state law privacy claim based on employer's requirement that employee suspected of illegal drug use undergo search of person and automobile was preempted by Section 301); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988) (since resolution of union employee's claim for invasion of privacy under state law following the failure of an employer-ordered drug test could not be made without interpreting a collective bargaining agreement claim was preempted under Section 301); *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F.Supp. 183 (D. Or. 1986) (claim alleging that an employer's alcohol and drug testing program violated employees' common law right of privacy preempted by Section 301). Thus, no conflict exits among the Circuit courts.

CONCLUSION

Local 246 has raised no "special and important" reason in its petition to justify granting review of the Ninth Circuit's decision in this case. Accordingly, the petition should be denied.

Dated: February 16, 1989.

Respectfully submitted,

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